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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1326

ELGIN, JOLIET & EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

BERNARD FERAK, SPECIAL ADMINISTRATOR OF THE ESTATE OF MICHAEL FERAK, DECEASED,

Respondent.

REPLY BRIEF FOR PETITIONER

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Petitioner respectfully submits this reply brief.

I.

At p. 3 of his Brief in Opposition (hereafter "Resp. Br.") respondent cites *St. Louis Iron Mountain & Southern Ry. Co.* v. *Craft* (1915) 237 U. S. 648; *Gulf, Colorado & Santa Fe Railroad* v. *McGinnis* (1912) 228 U. S. 173 and *Michigan Central Railroad Co.* v. *Vreeland* (1913) 227 U. S. 59 as "in accord" with the decisions of the Illinois Supreme Court in this case and in *Jensen*. At pages 5 and 6 of the Petition we pointed out that these cases specifically hold that the word "children" in § 1 of the Act excludes adult, non-dependent children.

II.

Respondent also cites *Isgett* v. *Seaboard Coastline R. Co.* (D. C., S. C. 1971), 332 F. Supp. 1127, 1142; *Hopps' Estate* v. *Chesnut* (1949) 324 Mich. 256, 36 N. W. 2d 908; and *Petition of United States* (S. D., N. Y. 1950) 92 F. Supp. 495, 497 as "in accord with the decisions of the Illinois Supreme Court in this case and in *Jensen*" (Resp. Br. 3). None of these cases so hold.

In *Isgett* at p. 1142 the court pointed out

> "From the record it is obvious he [the original plaintiff] has a surviving wife and children, which eliminates the showing of dependency."

Neither the ages of the children nor the distribution to them, if any, appears from the opinion. The fact there was a surviving widow alone supported the award.

Hopps' Estate was a proceeding in probate to distribute the proceeds of a settlement of the decedent's personal injury claim; the court ordered a distribution between the widow and two non-dependent adult daughters by a former marriage in accordance with the state law of descent and distribution. This holding is clearly erroneous. In *Taylor, admx.* v. *Taylor* (1914) 232 U. S. 363 the syllabus summarises the holding of this court:

> "The Employers' Liability Act of 1908, as amended in 1910, supersedes all state statutes upon the subject covered by it, and the distribution of the amount recovered in an action for death of an employe is determined by the provisions of that act and not by the state law."

No children, minor or adult, were claimants in *Petition of United States*. The court allowed recovery by non-dependent parents for their son's pain and suffering, but denied recovery on behalf of a non-dependent sister of another decedent. The relevance of this case is questionable.

III.

Next respondent asserts (Resp. Br. 3):

> "The Courts of Illinois have uniformly construed the unmodified word 'children' as used in Section 1 and Section 9 of the Federal Employers' Liability Act (45 U. S. C. § 51, et seq.; hereinafter the 'FELA') to mean all children regardless of whether they might be 'minor' or 'adult.' "

No Illinois cases which have so "uniformly construed the unmodified word 'children' " are cited. The Illinois Supreme Court did not rely upon any such "uniform construction" in the opinion below or in *Jensen;* instead the court chose what it called the "ordinary dictionary meaning" rather than the construction of the statutory language by this court in *Vreeland, McGinnis, Kelly,* and *Craft* as appears at pages 5-7 of the Petition.

IV.

Finally, respondent's argument (Resp. Br. 4-5) does not blunt the clear-cut conflict the Illinois court's "measure of damages" construction of the word "children" in sections 1 and 9 of the Act and the Missouri court's holding in *Auld* v. *Terminal R. Assn.* (1970) 463 S. W. 2d 297, 299, cert. den. (1971) 401 U. S. 940, that "we do not see that the difference in the measure of damages in the two sections has any effect on the intention of Congress in its use of" to quote the court in *Craft* the "exact words that the right given to the injured person 'shall survive' to his personal representative' for the benefit of the same relatives in whose behalf the other right is given." (237 U. S. at 657.) This court said further in *Craft* (pp. 657-8):

> "Brought into the act by way of amendment. This provision expresses the deliberate will of Congress. Its terms are direct, evidently carefully chosen, and should be given effect accordingly."

We submit that certiorari should be granted to resolve the conflict between this court's construction of the statutory provisions and the differing "measure of damages" construction of the Illinois *Jensen-Ferak* rule.

Respectfully submitted,

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